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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

EVELYN ORTEGA, Plaintiff and Appellant, v. DIGNITY HEALTH, INC., Defendant and Respondent.	B277991 Los Angeles County Super. Ct. No. BC548153

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Affirmed.

The Mirroknian Law Firm, Reza Mirroknian and Hider Al-Mashat for Plaintiff and Appellant.

Cole Pedroza, Kenneth R. Pedroza and Maureen M. Home; Law + Brandmeyer and Yuk K. Law for Defendant and Respondent.

INTRODUCTION

After her employment was terminated, Evelyn Ortega sued her employer Dignity Health, Inc., dba Community Hospital of San Bernardino (Hospital) under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).[1] Ortega's claims for disability discrimination, retaliation, failure to engage in the interactive process to determine a reasonable accommodation for her disability, and failure to provide a reasonable accommodation went to trial. The jury returned a special verdict in favor of the Hospital. Ortega appeals from the judgment entered on the jury's verdict that (1) the Hospital did not fail to engage in the interactive process, and (2) the Hospital did not fail to provide a reasonable accommodation. Because substantial evidence supports the verdict, we affirm.

FACTS AND PROCEDURAL BACKGROUND[2]

1. *Injury and initial medical leave*

Ortega worked for the Hospital as a registered nurse (RN) in its medical/surgical department. While providing patient care on June 15, 2011, Ortega tripped over a wire and fell. She suffered a fractured left ankle and left knee contusion and was placed on leave for six months.

On December 8, 2011, Ortega's doctor, Dr. Ghazal, released her to return to work with restrictions of "sedentary work only." At trial, Ortega confirmed Dr. Ghazal explained that meant she should perform clerical duties, not patient care.

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[1] Undesignated statutory references are to the Government Code.

[2] We only include those facts relevant to this appeal and state them in the light most favorable to the judgment.

2. ***Participation in transitional work program***

On December 13, 2011, Ortega returned from leave and began participating in the Hospital's transitional work program (TWP). The TWP is designed for employees transitioning back to work after an industrial injury. The TWP is intended "to return injured employees to [the Hospital's] work force at the earliest medically allowable date, so as to assist in their medical recovery." Participation in the program is limited to 90 days, with the possibility of a 30-day extension. According to the policy, if an employee's doctor "deems [the employee is] unable to return to full duty" at the end of the TWP period, the employee is "taken off work and will receive temporary disability or SDI . . . until released to full duty."

Carmen Cabrera—the manager of "employee health services, workmen's comp[ensation], and wellness"—oversees the TWP. She places participating employees in temporary positions based on their work restrictions and the needs of participating hospital departments. Injured nurses are not put on medical floors for patient safety reasons: if a patient emergency occurs, the injured nurse may be unable to respond. Cabrera testified the goal of the TWP is to return employees to their original jobs "to the best of their ability."

When Ortega returned to work from her leave, Cabrera explained the TWP and Ortega agreed to participate. Cabrera gave Ortega sedentary work assignments. Ortega first was assigned to do clerical work and make discharge calls for the hospital's labor and delivery department and for the director of the medical/surgical department. She then worked in the employee health department under Cabrera, performing the "partial duties" of an employee health nurse. Ortega gave

employees TB tests and immunizations, fitted employees with respiratory masks, and helped the clerk track employees due for TB testing. Throughout her participation in the TWP, Ortega gave Cabrera disability status forms from Dr. Ghazal restricting her duties to "sedentary work only." Ortega received the same salary and benefits as she had as a nurse while working in the TWP.

3. *Temporary medical leave and job applications*

Ortega participated in the TWP for four months through April 16, 2012.[3] As of March 7, 2012,[4] Dr. Ghazal continued to restrict Ortega to "sedentary work only." Ortega therefore could not return to her clinical nursing position in the medical/surgical department. Sedentary restrictions cannot be accommodated for a nurse providing direct patient care on the floor because, according to Cabrera, "nurses have to be fit for duty and ready to step into action if they need to."

As the time limit for Ortega's TWP participation approached, Cabrera talked with her. Ortega testified Cabrera encouraged her to apply for an open position in employee health services. Cabrera testified Ortega knew Cabrera needed a nurse in employee health and, when Ortega voiced her interest in the position, Cabrera encouraged her to apply. Cabrera also testified she reminded Ortega she would have to apply for the position and

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[3] Cabrera extended Ortega's TWP time for an additional 30 days.

[4] Ortega's March 7, 2012 disability status form states Ortega's next visit is April 12, 2012. The record does not include a disability status form for April 2012, but Ortega testified she continued to have sedentary work restrictions in April.

go through the interview process. Ortega applied and got an interview. The vice-president of the department interviewed Ortega with Cabrera present.

Ortega did not get the job. She testified Cabrera told her Cabrera had learned someone more senior who had been laid off in the hospital likely would be given priority. Cabrera, on the other hand, testified Ortega did not do well in the interview, observing "critical thinking was not evident during the interview at all." Cabrera explained the employee health nurse position was not a patient care position. It required the employee to make presentations to a committee and to articulate and communicate clearly; it also required computer skills. The reasons given for not hiring Ortega were her lack of communication and leadership skills, and a possible language barrier. Cabrera did not make the decision not to hire Ortega. Someone from outside the hospital was hired to fill the position.

Ortega testified that, after she did not get the employee health position, Cabrera told her she would be placed on leave and asked her if she had seen any other positions. Ortega testified she told Cabrera she had seen a position for a "clinical quality coordinator RN" (quality position). Cabrera testified Ortega approached her about the quality position because she had advised Ortega to start looking for positions, and Cabrera encouraged Ortega to apply. Cabrera testified she "thought this was a great fit for [Ortega]. [She] would be abstracting or collecting data . . . that she's accustomed to inputting as a nurse on the floor." Cabrera called Yvette Whittaker, the director/manager of the quality department, and recommended she interview Ortega. Cabrera testified she spoke to Whittaker about Ortega's sedentary restrictions. She testified, "I believe at

the time, both Yvette and I believed that her restriction for sedentary work would not be an issue in a quality department."

Ortega was put on temporary worker's compensation medical leave beginning April 17, 2012, with an expected return date of May 25, 2012.[5]

Ortega interviewed with Whittaker for the quality position before or around April 29, 2012.[6] She was offered the job in writing on April 29, 2012.[7] A human resources status change form, signed by Whittaker on April 25, 2012, states Ortega's salary change as "internal transfer." The form indicates Ortega's status as a clinical nurse in the medical/surgical department changed to a clinical quality coordinator, RN in the quality department as of April 29, 2012, amended to May 7, 2012.

On May 4, 2012, Dr. Ghazal indicated Ortega's work status as "regular duty" with no restrictions. Ortega began working in the quality department on May 7, 2012. Newly hired employees must undergo a 90-day probationary period. Three management-

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[5] We cannot tell from the appellate record whether Ortega applied for the quality position before or after she was put on leave. We also cannot tell when Cabrera recommended Whittaker interview Ortega. We note that when the trial court considered Ortega's posttrial motions it also could not determine from the evidence when Ortega applied for either the employee health or quality positions.

[6] Ortega first testified she learned the quality position was open from Cabrera after she gave Cabrera her May 4, 2012 disability status form clearing her for full duty. Ortega then remembered Cabrera had called her to come in for an interview for the position on April 29, 2012.

[7] Ortega testified she did not receive the April 29 letter.

level employees, including the human resources director, testified employees moving internally between departments also must complete this 90-day probationary period—that included Ortega.

By June 12, 2012, Whittaker did not believe Ortega had progressed sufficiently in the position. She testified she had met with Ortega at least four times about her performance. Whittaker's primary concern was Ortega's accuracy level. She called human resources and reported she had a probationary employee who was not meeting "the performance expectation for the position." On June 13, 2012, Whittaker terminated Ortega's employment "strictly on performance," effective June 15, 2012. Whittaker did not talk to Cabrera before terminating Ortega.

4. *Trial and appeal*

Ortega sued the Hospital alleging causes of action for: (1) employment discrimination; (2) failure to engage in a timely, good faith interactive process; (3) failure to provide reasonable accommodation; (4) retaliation; (5) failure to prevent discrimination; (6) wrongful termination in violation of public policy; and (7) intentional infliction of emotional distress. She pursued the first four causes of action at trial. The jury returned a unanimous verdict in favor of the Hospital.

Ortega then moved for judgment notwithstanding the verdict or, alternatively, for a new trial. The court denied both motions. Ortega filed a timely notice of appeal.[8]

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[8] Ortega filed a notice of appeal from the judgment and the order denying her motion for judgment notwithstanding the verdict. Ortega's opening brief addresses the judgment only, however, and at oral argument her counsel said he did not think the motion was the subject of the appeal. As Ortega did not argue the court erred in denying the motion for judgment

DISCUSSION

1. *Contentions*

Ortega contends substantial evidence does not support the jury's verdict that (1) the Hospital did not fail to engage in a timely, good faith interactive process; and (2) the Hospital did not fail to provide reasonable accommodations to Ortega.[9] She limits her appeal to the time period between April 16, 2012, when her TWP time ended, and April 29, 2012, when she secured the quality position.

2. *Standard of review*

We review a challenge to the sufficiency of the evidence under the familiar substantial evidence standard. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) Our review " 'begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the [jury's] determination.' " (*Moran v. Foster Wheeler Energy Corp.* (2016) 246 Cal.App.4th 500, 517.) " ' "We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." ' " (*Lenk,* at p. 968.) "We do not reweigh evidence or reassess the credibility of witnesses. [Citation.] We are 'not a second trier of fact.' " (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1246.) Thus, "[w]e do not review the evidence to see if

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notwithstanding the verdict, she has forfeited that issue. (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.)

[9] Ortega does not appeal from the judgment in favor of the Hospital on her disability discrimination and retaliation causes of action.

there is substantial evidence to support the losing party's version of events, but only to see if substantial evidence exists to support the verdict in favor of the prevailing party." (*Id.* at p. 1245.) " 'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Id.* at p. 652.)

Where, as here, " 'the issue on appeal turns on a failure of proof at trial, the question for the reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." ' " (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 466.)

3. *Ortega presented no evidence she suffered harm from April 17 to April 29, 2012*

As the court instructed the jury, to prevail on her reasonable accommodation claim, Ortega was required to prove, among other undisputed elements, (1) that she had (or the Hospital perceived she had) a physical disability that limited her ability to work; (2) that she "was able to perform the essential job duties with reasonable accommodation for her physical disability"; (3) that the Hospital "failed to provide reasonable accommodation" for her physical disability; and (4) that she was harmed and the Hospital's "failure to provide a reasonable

accommodation was a substantial factor in causing" her harm. (See CACI No. 2541; *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1009-1010 (*Scotch*).) The court instructed the jury similarly on Ortega's failure to engage in the interactive process claim. Ortega was required not only to prove that the Hospital "failed to participate in a timely good-faith interactive process with [her] to determine whether reasonable accommodation could be made," but also that she was harmed and the Hospital's failure to engage in that process "was a substantial factor in causing" her harm. (See CACI No. 2546.)

Thus, even if substantial evidence did not support the jury's findings that the Hospital did not fail to provide Ortega a reasonable accommodation and to engage in the interactive process, Ortega could not prevail on her claims unless the jury also found she was harmed during her leave period as a result. The jury did not reach the questions of whether Ortega was harmed or the Hospital's conduct was a substantial factor in causing her harm. But the jury could not have found in Ortega's favor on that element in any event because, as the Hospital notes, Ortega did not present any evidence of harm—economic or noneconomic—arising from her 13-day leave. (Cf. *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 114 ["Only when an error has resulted in a miscarriage of justice will it be deemed to be prejudicial so as to require reversal. [Citation.] A miscarriage of justice exists if, in the absence of error, a result more favorable to plaintiff[ ] probably would have occurred."].)

At trial, Ortega presented evidence of economic and noneconomic damages she suffered *after* her employment was terminated. Ortega's damages expert calculated her loss of earnings and benefits *from June 15, 2012*. He was instructed to

begin on that date. He did not calculate any earnings or benefits lost from April 17 through April 29. Nor did Ortega testify that she incurred economic damages during her leave. Ortega cites only to her testimony, in response to questions by her counsel about asking her doctor during that time to remove her sedentary restrictions, that she "need[ed] a job in order to survive, to pay my bills." A jury could not reasonably conclude Ortega suffered economic damage during her 13-day leave, or calculate any damages for that matter, based solely on that testimony. Ortega also did not testify that she suffered noneconomic damages, such as emotional distress, during that time frame. She testified she saw a psychiatrist for 15 months, but not until after her termination in June 2012. All of the evidence supporting Ortega's claims of harm relate to the harm she suffered when the Hospital terminated her employment in June 2012—a claim Ortega does not raise on appeal.[10]

In short, Ortega failed to present any evidence from which a jury could conclude she was harmed during her leave period. Reviewing the entire record as we must, substantial evidence

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[10] At oral argument, Ortega's counsel argued the evidence of damages was not broken down at trial because Ortega contended she ultimately was wrongfully terminated, but the evidence of harm encompassed everything Ortega went through. Counsel argued we should reverse the judgment, enter judgment in Ortega's favor on liability, and remand for a jury to determine her damages. We are not persuaded. Had the jury found the Hospital had failed to provide a reasonable accommodation or to engage in the interactive process, it would have had no evidence that Ortega had been harmed. Ortega was offered and accepted a new job during her leave, and she did not testify she suffered economic or noneconomic harm during the 13-day period.

supports the jury's verdict in favor of the Hospital on Ortega's claims it failed to provide her a reasonable accommodation and to engage in the interactive process while she was on leave from April 17 to April 29, 2012. No evidence existed from which the jury could conclude Ortega satisfied an element of her claims—that she was harmed during that period. Ortega therefore has failed to meet her burden on appeal to demonstrate reversible error. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 822 ["to be successful on appeal, an appellant must be able to affirmatively demonstrate error on the record before the court"].)

Although we could affirm on this ground alone, substantial evidence also supports the jury's findings that the Hospital did not fail to provide Ortega a reasonable accommodation and to engage in a timely, good faith interactive process with her.

4. Substantial evidence supports the reasonable accommodation verdict

a. *Applicable law*

FEHA "makes it an unlawful employment practice to 'fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee.' " (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 721 (*Atkins*), quoting § 12940, subd. (m)(1).) "Although FEHA does not define what constitutes 'reasonable accommodation' in every instance, examples provided in the statute itself and the regulations governing its implementation include job restructuring, part-time or modified work schedules or 'reassignment to a vacant position.' " (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222 (*Raine*).) "[A] finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end

of the leave, the employee would be able to perform his or her duties." (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226 (*Hanson*); see also *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245 (*Jensen*).) However, if an "employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available." (*Raine, supra*, 135 Cal.App.4th at p. 1223.)

"FEHA does not obligate an employer to choose the best accommodation or the specific accommodation a disabled employee or applicant seeks. [Citation.] It requires only that the accommodation chosen be 'reasonable.' [Citation.]" (*Raine, supra*, 135 Cal.App.4th at p. 1222.) Generally, the reasonableness of an accommodation is a question of fact. (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 374.)

Ortega argues the uncontradicted evidence compels a finding that the Hospital failed to reasonably accommodate her disability from April 17 to April 29, 2012, because (1) the Hospital put her on leave even though she could work in a sedentary position; (2) the Hospital did not reassign her to a vacant position for which she was qualified; and (3) the Hospital's TWP policy violated FEHA by requiring disabled employees to be "fully healed" before returning to work.

b. *Temporary leave was a reasonable accommodation*

Ortega points to the following special jury instruction,[11] quoting a portion of FEHA's interpretive regulation governing reasonable accommodation: "When an employee can work with a

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[11] Ortega requested this instruction, and the court gave it over the Hospital's objection.

reasonable accommodation other than a leave of absence, an employer may not require that the employee take a leave of absence." (Cal. Code. Regs., tit. 2, § 11068, subd. (c).) Ortega interprets "work" to mean any work, not work in her original clinical floor nurse position. Thus, she argues that, because she could not perform the essential functions of a clinical floor nurse when her TWP temporary position ended, but could work in a *different position* doing sedentary work, the Hospital could not put her on the two-week temporary disability leave as a reasonable accommodation. Ortega cites no authority, however, to support this contention that an employer essentially can never place an employee on temporary leave as a reasonable accommodation if the employee can work in a different job.

We read the term "work" differently.[12] The special jury instruction Ortega cites quotes only part of the regulation's subdivision on which it is based. The full subdivision reads:

> "When the employee *cannot presently perform* the essential functions of the job, or otherwise needs time away from the job for treatment and recovery, holding a job open for an employee on a leave of absence or extending a leave . . . may be a reasonable accommodation *provided that the leave is likely to be effective in allowing the employee to return to work at the end of the leave*, with or without further reasonable

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[12] " ' "Questions of statutory interpretation, and the applicability of a statutory standard to undisputed facts, present questions of law, which we review de novo." ' " (*Atkins, supra,* 8 Cal.App.5th at p. 715.)

> accommodation, and does not create an undue hardship for the employer. When an employee can work with a reasonable accommodation other than a leave of absence, an employer may not require that the employee take a leave of absence."

(Cal. Code Regs., tit. 2, § 11068, subd. (c), italics added.)

In interpreting a regulation promulgated by an administrative agency, we first "give the regulatory language its plain, commonsense meaning. If possible, we must accord meaning to every word and phrase in the regulation, and we must read regulations as a whole so that all of the parts are given effect." (*Butts v. Board of Trustees of California State University* (2014) 225 Cal.App.4th 825, 835 (*Butts*) [noting rules of statutory construction also govern interpretation of regulations].) Reading the subsection *as a whole*, we interpret the second sentence to mean that, if an employee cannot presently perform the essential functions of her job, but can perform those functions with a reasonable accommodation other than a leave of absence, then the employer cannot require the employee to take a leave of absence. In other words, the employer first must accommodate the employee in her position if it can. If not, the employer may require the employee to take a temporary leave of absence if doing so likely will allow the employee to return to that position with or without reasonable accommodation.[13]

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[13] Moreover, by its plain meaning "presently perform" indicates leave is appropriate for an employee who is unable to work in the employee's normal position *at that time*, but may be able to do so later.

Our reading of the regulation is consistent with case law. (See *Hanson, supra*, 74 Cal.App.4th at pp. 226-227 [employer's extension of injured worker's leave to recuperate was a reasonable accommodation because there was no showing that the employee's "prognosis for recovery was not good" at the time he began his leave]; *Jensen, supra*, 85 Cal.App.4th at p. 263 ["[h]olding a job open for a disabled employee who needs time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future"][14]; *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 941, 943, 955 [airline had duty to investigate alternative positions for pilot placed on leave—who could no longer medically qualify to fly after an AIDS diagnosis—where pilot "indisputably was disqualified from performing his job as a pilot"].)

The jury appears to have applied the jury instruction as we interpret it. Substantial evidence supports the jury's implicit finding that placing Ortega on a temporary leave was a reasonable accommodation.

First, the evidence established Ortega could not "presently perform" the clinical floor nurse position, even with an accommodation, in April 2012. Ortega does not contend otherwise. When Ortega was put on temporary leave, she had

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[14] In *Jensen*, however, a temporary leave was an insufficient accommodation because it was undisputed the disabled employee was "unlikely ever to be able to return" to her position, requiring the employer to determine if it had any open positions that met the employee's qualifications and restrictions. (*Jensen, supra*, 85 Cal.App.4th at p. 264.)

sedentary work restrictions. Testimony also established a nurse providing patient care could not be accommodated with sedentary restrictions because of patient safety.

Second, substantial evidence supports a finding that Ortega likely would be able to resume her nursing duties after a temporary leave. Ortega's ankle injury did not require surgery, and Cabrera testified she would extend the TWP for 30 days—as she did for Ortega—when an employee was continuing physical therapy or seeing a doctor and showing improvement. Ortega's doctor cleared her to return to regular duty without any work restrictions on May 4, three weeks earlier than expected.

Ortega testified that when she saw Dr. Ghazal on May 4, 2012, she asked him to remove her restrictions so she could go back to work full-time "without restrictions as per my employer['s] suggestion[ ] that I should remove the restriction." She also testified she asked him to remove the restrictions "because [she] needed a job in the [*sic*] full-time." Ortega testified she told the doctor she continued to have swelling, pain, and some limping. She said she told Dr. Ghazal—referring to the quality position—"there may be a position given to me as a full-time [*sic*], but it doesn't require walking, patient care. It's purely in a desk job."

This testimony does not compel a finding the accommodation was not reasonable, however.[15] Ortega had been offered the quality position on April 29, 2012, *days before* her visit to Dr. Ghazal. Indeed, Whittaker had approved Ortega's

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[15] See also discussion below about conflicting testimony the jury resolved in the Hospital's favor over the lifting of Ortega's sedentary restrictions.

status change to the quality position on April 25, 2012. Ortega did not call Dr. Ghazal as a witness at trial. Based on the record, the jury reasonably could discount Ortega's testimony and find Dr. Ghazal's status report—that Ortega no longer had sedentary restrictions—credible.

Sufficient evidence, therefore, supports a finding that the temporary leave of absence was a reasonable accommodation. And, viewing the evidence in the light most favorable to the Hospital, we cannot agree the evidence required a finding that the temporary leave was unreasonable because Ortega could have continued to work in a sedentary position. The jury was instructed that "If more than one accommodation is reasonable, an employer makes a reasonable accommodation if it selects one of those accommodations in good faith." In *Hanson,* this court noted, " '[t]he Appendix to the ADA regulations explains that "the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide." [Citation.] As the Supreme Court has held in analogous circumstances, an employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided. [Citation.]' (*Hankins v. The Gap, Inc.* (6th Cir. 1996) 84 F.3d 797, 800-801, quoting from *Ansonia Board of Education v. Philbrook* (1986) 479 U.S. 60, 68-69.)" (*Hanson*, *supra*, 74 Cal.App.4th at p. 228.)

The Hospital, therefore, was "not obligated to choose the best accommodation or the accommodation [Ortega sought]" as long as the accommodation was reasonable. (*Hanson, supra*, 74 Cal.App.4th at p. 228.) That reassigning her to an open

sedentary position also may have been reasonable[16] does not negate the jury's conclusion the Hospital did not fail to provide

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[16] Nor do we agree the FEHA regulation and authorities Ortega cites compel a finding that the Hospital was required to look for an open position for Ortega—at that point in time—to fulfill its duty to accommodate her disability. The FEHA interpretive regulation provides that, "As a reasonable accommodation, an employer or other covered entity shall ascertain through the interactive process suitable alternate, vacant positions and offer an employee such positions, for which the employee is qualified . . . [¶] . . . if the employee can no longer perform the essential functions of his or her own position even with accommodation." (Cal. Code. Regs., tit. 2., § 11068, subd. (d)(1)(A).) Courts have interpreted FEHA to require an employer to "make affirmative efforts to determine whether" an alternative position is available when the employee "cannot be accommodated in his or her existing position." (*Raine, supra*, 135 Cal.App.4th at p. 1223; see also *Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 (*Spitzer*).)

We must read this subdivision of the regulation with the preceding subdivision that permits an employer to place an employee on leave if leave likely would enable the employee to return to his or her existing position. (*Butts, supra*, 225 Cal.App.4th at p. 835 [regulations must be read to give effect to all of the parts].) The regulation's use of the phrase "can no longer perform" also suggests the employee has been deemed unable (or likely unable) to perform those job functions ever or at least in the near future, which the jury could conclude was not the case here. Moreover, courts have required employers to consider reassignment for disabled employees where the employee is unlikely to be able to return to the original position at all or at any time in the near future, other accommodations have failed to enable the employee to perform in the original position, or the employer has a policy or practice of making such

Ortega with a reasonable accommodation. Ortega's choice to work in the quality position rather than return to her nursing position also does not render the leave an unreasonable accommodation. (Cf. *id.* at p. 227 ["fact that at the end of his leave, [employee] was restricted from engaging in certain activities, does not render the leave accommodation itself unreasonable"].) Accordingly, substantial evidence supports a finding that holding Ortega's nursing position open while she was placed on temporary leave was a reasonable accommodation.

c. *The TWP as applied to Ortega did not violate FEHA*

Ortega contends the TWP's policy requiring participants to go on leave if they are "unable to return to full duty" at the conclusion of the 90- to 120-day program violates FEHA. Ortega relies on the FEHA interpretive regulation that states: "An employer . . . shall assess individually an employee's ability to perform the essential functions of the employee's job either with or without reasonable accommodation. In the absence of an individualized assessment, an employer . . . shall not impose a '100 percent healed' or 'fully healed' policy before the employee can return to work after an illness or injury." (Cal. Code Regs.,

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reassignments. (See *Atkins, supra,* 8 Cal.App.5th at pp. 704, 706, 729, 731 [agreeing FEHA does not require an employer to temporarily accommodate an injured employee indefinitely or make a temporary position permanent, but "to the extent an employer's policies or practices indicate such accommodations are reasonable, an employer may violate FEHA by not making those accommodations available to all employees"]; *Jensen, supra*, 85 Cal.App.4th at p. 264; *Spitzer, supra*, 80 Cal.App.4th at pp. 1380-1383, 1390.) The evidence established Ortega's situation fit none of these scenarios.

tit. 2, §11068, subd. (i).) Special jury instruction No. 22 included this regulatory language.

Ortega thus asserts she was unlawfully subjected to a "fully healed" policy without individualized assessment when she was placed on leave after she reached the TWP time limit. We need not determine whether the TWP policy violates FEHA in the abstract, as substantial evidence supports the jury's implicit conclusion that the policy as applied to Ortega did not.

Substantial evidence supports a finding that the Hospital performed a sufficient individualized assessment of Ortega's abilities to perform in her clinical floor nurse position under the circumstances: the jury heard testimony that a clinical floor nurse cannot have sedentary restrictions and Ortega was limited to sedentary work at that time; and Cabrera testified she discussed the need for Ortega to have her work restrictions lifted to return to her clinical floor nurse position. The jury could have concluded the Hospital's consideration of the doctor's report along with Cabrera's discussions with Ortega was a sufficiently "individualized assessment" of Ortega's inability to perform her job even with a reasonable accommodation.

Ortega relies on *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34. But there the disabled employee contended *he could perform* the essential functions of his job. Rather than assess the employee's actual abilities,[17] however, the employer

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[17] In *Gelfo,* Gelfo had been laid off from his original metal fitter job. At the time the employer insufficiently assessed his abilities to perform his job, he had gone through training for a different fabricator job, and thus the employer was assessing his abilities to perform that new job. (*Gelfo, supra*, 140 Cal.App.4th at pp. 40-43.) At the time Ortega contends the Hospital failed to

concluded it could not accommodate the employee, relying on a doctor's report restricting the employee's activities. (*Id.* at pp. 42-43.) Ortega never contended or testified she could have performed the essential functions of her position—a clinical floor nurse—had Cabrera assessed her abilities. Nor does she contend a more individualized assessment of her abilities would have revealed her doctor's restrictions were inaccurate as in *Gelfo*.

Even if the Hospital should have discussed with Ortega whether she was healed sufficiently to resume her floor nurse duties with a reasonable accommodation other than the sedentary restrictions ordered by her doctor, Ortega has presented no evidence that she could have performed the essential functions of her clinical floor nurse position by April 17, 2012, with or without an accommodation. Thus, she was not prejudiced by the Hospital's application of the policy.

5. *Substantial evidence supports the jury's verdict that the Hospital did not fail to engage in the interactive process*

a. *Applicable law*

FEHA makes it an unlawful employment practice "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."

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engage in the interactive process, she was in a program, and then on leave, to enable her to return to her original nursing job. The Hospital, therefore, would be assessing Ortega's ability to return at that time to her nursing position, not some other position.

(§ 12940, subd. (n).) An employer's failure to engage in the interactive process gives rise to an independent cause of action. (*Gelfo, supra*, 140 Cal.App.4th at p. 61.) "Nonetheless, an employer's duty to accommodate is inextricably linked to its obligation to engage in a timely, good faith discussion with an applicant or employee whom it knows is disabled, and who has requested an accommodation, to determine the extent of the individual's limitations, before an individual may be deemed unable to work." (*Ibid.*, fn. omitted.)

This interactive process has been called the " ' "heart of the [FEHA's] process and essential to accomplishing its goals. It is the primary vehicle for identifying and achieving effective adjustments which allow disabled employees to continue working without placing an 'undue burden' on employers." ' " (*Gelfo, supra*, 140 Cal.App.4th at p. 61.) "The employee must initiate the process unless the disability and the resulting limitations are obvious. [¶] . . . [¶] Once . . . initiated, the employer's obligation to engage in the process in good faith is continuous." (*Scotch, supra*, 173 Cal.App.4th at p. 1013.)

"Although it is the employee's burden to initiate the process, no magic words are necessary, and the obligation arises once the employer becomes aware of the need to consider an accommodation." (*Gelfo, supra*, 140 Cal.App.4th at p. 62, fn. 22.) " '[T]he employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed.' " (*Scotch, supra*, 173 Cal.App.4th at p. 1013.)

b. *Ortega did not present evidence from which the jury could conclude she was qualified for a vacant position*

Ortega contends the Hospital failed to engage in the interactive process to explore alternatives to accommodate Ortega's restrictions at the end of the TWP to allow her to keep working and failed to engage in the interactive process while she was on leave, leaving her to find an alternative position on her own.[18] "To prevail on a claim under section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred." (*Scotch, supra*, 173 Cal.App.4th at pp. 1018, 1019 [employer entitled to summary judgment even though jury could have concluded employer should have initiated a second meeting with employee to discuss accommodations where employee could not identify reasonable accommodation "objectively available during the interactive process" and thus suffered no remedial injury from employer's alleged failure to engage in interactive process].)

Ortega, however, presented no evidence at trial from which a jury could conclude a different job—for which she was qualified—would have been available to her had the Hospital continued to discuss potential accommodations just before and during her leave. Ortega presented evidence that the Hospital maintained a list of open positions available from June 14, 2011 through April 20, 2012, but no evidence she was qualified or able

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[18] Ortega does not appear to contend the Hospital failed to engage in the interactive process when it assigned her to temporary positions during the TWP.

to perform those listed jobs with her sedentary restrictions, other than the quality position for which she applied. Our review of that job list (admittedly difficult due to its poor quality) reveals the list consists mainly of clinical nurse positions involving patient care—the position Ortega could not perform with sedentary restrictions. Ortega presented no evidence she was qualified for the nonclinical nurse positions listed, including: health education coordinator, medical staff coordinator, senior director of clinical operations, senior director of nursing, clinical case manager, house supervisor, clinical education director, director of maternal child health and pediatrics, director of transformational care, administrator of pediatrics-subacute, and vice president of behavioral health services.

The list also includes the employee health nurse position for which Ortega was deemed unqualified during her interview,[19] and the quality position that Ortega began and was terminated from based on her performance. Thus, the only position on the list for which Ortega presented evidence that she was qualified was the quality position that she was offered and accepted.

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[19] At oral argument, Ortega's counsel seemed to contend that, because Ortega appeared qualified on paper, the Hospital was required to assign her to the employee health position without interviewing her. Ortega cites no authority precluding an employer from determining if a disabled employee is qualified for a position by interviewing her. Rather, the authorities Ortega cites explain that where reassignment is the required reasonable accommodation—which was not the case here—the employer must give priority to the disabled employee. (See, e.g., *Jensen, supra*, 85 Cal.App.4th at p. 265.)

During closing arguments, Ortega's counsel argued the Hospital should have given Ortega the employee health nurse position instead of placing her on leave. He argued that position "is the reassignment that we looked at, as a form of reasonable accommodation." Substantial evidence supports a finding that Ortega was not qualified for the employee health position, however. Cabrera testified Ortega did not demonstrate she had the communication and leadership skills required for the position. While on temporary assignment in employee health, Ortega had performed only "partial duties"; thus, the mere fact she had worked in the department during her TWP time did not demonstrate she was qualified. FEHA does not require an employer to reassign a disabled employee "whose limitations cannot be reasonably accommodated in his or her current job . . . if there is no vacant position for which the employee is qualified." (*Spitzer, supra*, 80 Cal.App.4th at p. 1389.)

In sum, because Ortega presented no evidence that a vacant position for which she was qualified was available at the time she alleged the interactive process should have occurred during her leave, the jury's verdict in the Hospital's favor on that claim was not in error.[20]

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[20] Ortega relies on *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, to contend she could prevail on her interactive process claim even if the jury found she was reasonably accommodated. The facts there are quite different. The court concluded a verdict finding the employer did not fail to provide a reasonable accommodation but did fail to engage in the interactive process was consistent where the employer ignored the employee's requests for accommodation over a two-year period. (*Id.* at pp. 418-419, 422, 424.) The appellate court concluded the jury could find there was no failure

c. *Substantial evidence also supports a finding that the Hospital sufficiently engaged in the interactive process*

Ortega nevertheless asserts the jury could conclude only that the Hospital failed to engage in the interactive process based on Cabrera's admissions. Ortega cites Cabrera's testimony that the interactive process "was not activated at the time" because Ortega was in the TWP. Cabrera confirmed the interactive process "was never activated." Cabrera testified that in April 2012 she did not contact any Hospital departments to see if Ortega could be transferred to do sedentary work or if there were any open jobs.

Ortega ignores Cabrera's testimony, however, that she did not have the "ability to place [Ortega] in a permanent position." Cabrera testified that, when employees are in the TWP, her goal is "to get them back to their *original job*." (Italics added.) She testified the TWP and the Hospital's policies on accommodating disabled employees—what Cabrera referred to as "the ADA program"[21]—were two different programs. She also testified that an employee who completes the TWP, but will be unable to

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to provide an accommodation because the parties never reached the stage of discussing reasonable accommodations, but at the same time find the employer liable "because it obstructed the process to determine a reasonable accommodation." (*Id.* at pp. 425-426.)

[21] The ADA refers to the Americans with Disabilities Act, 42 United States Code section 12101 et seq., on which FEHA's reasonable accommodation and interactive process requirements are based. (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973, 980.)

return to her position, may be referred to human resources to discuss reassignment.

Cabrera testified the Hospital required a doctor's note stating an employee's restrictions before the Hospital would engage in the interactive process. She testified the policy avoided discrimination: "It would be discriminatory if I selected someone—If I see somebody walking funny and I said, you know, are you okay? Can you do your job?" Cabrera testified that if the Hospital cannot "safely alter the job duties" of an employee at that time, then she transitions the employee to the human resources department to work with the employee to look for openings where the employee can work with his or her restrictions. She understood the interactive process to be activated "when an employee has reached permanent and stationary" status.[22] She testified that when she placed Ortega on leave, "the ADA was not activated."

Ortega never testified she told Cabrera she did not think temporary leave was an appropriate accommodation for her. Nor did she tell Cabrera that she believed her sedentary restrictions would still be in effect after her leave or that she otherwise would be unable to perform the functions of a clinical floor nurse, even with an accommodation, after her restrictions were lifted.

A jury could conclude from Cabrera's testimony that, because Ortega had not told her that her sedentary work

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[22] "Under workers' compensation law, a disability is considered 'permanent and stationary' once an employee reaches the point at which he or she is no longer making improvement, or the employee's condition has been stationary for a reasonable period of time." (*Gelfo, supra*, 140 Cal.App.4th at p. 40, fn. 2.)

restrictions likely would continue past her temporary leave or did not present a doctor's note that Ortega's restrictions were "permanent and stationary," the Hospital was not required to look for alternative permanent positions for Ortega at that time.[23] Thus, substantial evidence supports a finding that the Hospital did not know further accommodation was needed, placing the proverbial ball in Ortega's court if she wanted a different accommodation, such as reassignment. (See, e.g., *Spitzer, supra*, 80 Cal.App.4th at p. 1390 [triable issue of fact as to whether employer should have determined if alternative positions existed where employee presented evidence employer knew initial accommodations had been ineffective].)

Ortega also contends her search for a new position put Cabrera on notice that she wanted to be reassigned as an accommodation for her sedentary work restrictions. Ortega argues Cabrera, therefore, should have worked with her to identify open positions and helped place her in one, rather than simply encouraging her to apply.

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[23] As Ortega notes, FEHA does not require an employee's condition be "permanent and stationary" to begin the interactive process. In these circumstances, however, where the Hospital already had provided Ortega accommodation through temporary assignments in the TWP, followed by a temporary leave to enable her to return to her original position, the jury could conclude Cabrera was not required to send Ortega to human resources to consider reassignment without an indication from Ortega that her sedentary restrictions had become permanent and stationary, so that a temporary leave would not be a reasonable accommodation.

When Cabrera put Ortega on temporary leave, Ortega had applied for the employee health position and been rejected. She also had expressed her interest to Cabrera in the quality position, and Cabrera had encouraged her to apply. Cabrera testified she believed both the employee health and quality management positions "were two great opportunities for a nurse" because Ortega had made clear in conversations with her that "[Ortega] did not want or she could not return to the floor nurse [position]. It was a little too heavy. The workload was hard, and so on."[24] Thus, when Ortega expressed interest in the vacancy Cabrera had for an employee health nurse, Cabrera encouraged her to apply. She did not help Ortega with the application process. Instead, Cabrera reminded Ortega she would have to apply and go through the interview process; Cabrera could not simply give her the position.[25]

Cabrera also testified that, once Ortega's sedentary restrictions were lifted on May 4, 2012, Ortega could have returned to a nursing job on any of the medical/surgical floors. Cabrera testified she did not look for a job for Ortega in one of the

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[24] The jury also heard Ortega's deposition testimony she did not want to look for a job in a hospital after her termination because she was "worried [she] would make a mistake" and had "some issues with time management when giving care to patients."

[25] Ortega testified she did not formally apply for the quality position, but expressed interest in it. In addition, although Cabrera did not help Ortega with that application, she recommended Whittaker interview Ortega for the position. Thus, a jury could conclude Cabrera "assisted" Ortega in obtaining that new position.

less physically demanding medical/surgical floors because at that point Ortega had been "released to full duty. She had no restrictions." Instead, Ortega began working in the quality position on May 7, 2012.

The jury could conclude from this testimony that Ortega did not seek reassignment as an accommodation, but—as the Hospital argued—because she no longer wanted to work as a nurse providing patient care on a medical floor—even if her restrictions were only temporary—because it was too demanding. The Hospital was not required to provide the accommodation of Ortega's choice, as long as the accommodation was reasonable. And, as discussed, substantial evidence supports a finding that a temporary leave of absence was a reasonable accommodation.

At trial, Ortega contended the Hospital "set [her] up" by telling her to get her work restrictions lifted and then putting her into the quality position on probation. To the extent Ortega argues the Hospital acted in bad faith by requiring her to remove her restrictions, the testimony conflicted.

Ortega testified that at the end of her TWP time, Cabrera asked her to ask her doctor to remove her restrictions so she would be "free to apply for a certain full-time job without restrictions because it is really very difficult for a certain institution to hire an employee with restrictions." Cabrera remembered her conversation with Ortega differently. She testified she discussed the need for Ortega to have her work restrictions lifted in order to return to her clinical floor nurse position. She denied telling Ortega she needed to have her restrictions lifted before she could apply for any job in the Hospital. She clarified both the employee health nurse job and the job in quality management "did not require her to be a full-

duty nurse" because they were desk jobs, not patient care jobs. Ortega did not have to return to full duty for the quality position. Whittaker also testified the quality position was appropriate for someone who needed sedentary duties. The job involved data abstraction done at a workstation.

Based on this evidence, we can infer the jury credited Cabrera's testimony over Ortega's about what she told Ortega about her need to remove her work restrictions. Substantial evidence supports the conclusion Ortega had to remove her sedentary work restrictions only to resume her clinical floor nurse position, not to begin work in the quality position. Cabrera and Whittaker testified consistently on this subject. The jury also could conclude Dr. Ghazal removed Ortega's restrictions because Ortega was fit to resume nonsedentary work. The May 4, 2012, June 21, 2012, August 1 and 16, 2012, and September 6, 2012 disability status forms all state Ortega's work status is regular duty with no restrictions.[26] We cannot say the evidence was uncontradicted or that it leaves no room for a determination that it was insufficient to support the jury's findings.

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[26] Both the June 21 and August 1, 2012 forms also note "last visit her employer asked her to get a release to regular duties[;] she did that and she was laid off a month later." Based on Ortega's testimony, the jury could infer Dr. Ghazal's note simply reflected what Ortega had told him.

DISPOSITION

The judgment is affirmed. The Hospital is to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.